guise that he is an agent of a refugee terrorist leader and then to target these recruited persons against the FBI, the Dade County Police, and the CIA, the ultimate goal being to infiltrate these agencies. F is to keep the intelligence officer informed as to his progress in this regard but his reports are to be made by mail, because the U.S. Government cannot open the mail unless a crime is being committed.

Comment.—As in case No. 4, no tap would be permitted under S. 1566. This is not the kind of information contemplated under the act. A tap would not be permitted under section 794 of title 18 as well. If F is to report in "by mail" is F going to do his recruitment by telephone? Does the Government plan to read S. 1566 to permit the refugee organizations to be wiretapped to find out if they are infiltrated? These are dangerous readings of S. 1566. The proper action is to allow the FBI, having this much information, to foil F's scheme.

In sum, the Justice Department is "reaching" for the exceptional case to establish the need for a deviation from the criminal standard. Contrary to all experience with judicial warrants in the wiretapping area, the Department presumes "strict construction" by judges will hamper legitimate intelligence. The Justice Department should be reminded that only seven judges, picked by the Chief Justice of the U.S. Supreme Court, will review these warrant requests. Of course, this does not give the Justice Department any certainty that all applications will be approved. But the criminal standard does not appreciably make the process more risky for the Government. On the other hand, the noncriminal standard is a dangerous precedent for abuse.

SENATE REPORT NO. 95-701

[page 1]

The Select Committee on Intelligence, to which was referred the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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[page 5]

PURPOSE OF AMENDMENTS

The Committee on the Judiciary adopted several amendments to S. 1566 designed to clarify and make more explicit the statutory intent, to provide further safeguards for individuals subjected to electronic surveillance pursuant to this new chapter, and to provide a detailed procedure for challenging such surveillance, and any evidence derived therefrom, during the course of a formal proceeding.

sequent trial testimony, a Government witness provides evidence that the electronic surveillance may have been authorized or conducted in violation of the court order. The most common circumstance in which such a motion might be appropriate would be a situation in which a defendant queries the Government under 18 U.S.C. 3504 and discovers that he has been intercepted by electronic surveillance even before the Government has decided whether evidence derived from that surveillance will be used in the presentation of its case. In this instance, under the appropriate factual circumstances, the defendant might move to suppress such evidence under this subsection even without having seen any of the underlying documentation.

A motion under this subsection shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the movant was not aware of the grounds for the motion. The only change in subsection (d) from S. 3197 is to remove as a separate, independent basis for suppression the fact that the order was insufficient on its face. This is not a substantive change, however, since communications acquired pursuant to an order insufficient on its face would be unlawfully acquired and therefore subject to suppression under paragraph (1).

Subsection (e) states in detail the procedure the court shall follow when it receives a notification under subsection (c) or a suppression motion is filed under subsection (d). This procedure applies, for example, whenever an individual makes a motion pursuant to subsection (d) or 18 U.S.C. 3504, or any other statute or rule of the United States to discover, obtain or suppress evidence or information obtained or derived from electronic surveillance conducted pursuant to this chapter (for example, Rule 12 of the Federal Rules of Criminal Procedure). Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure "notwithstanding any other law" that must be used to resolve the question. The committee wishes to make very clear that the procedures set out in subsection (e) apply whatever the underlying rule or statute refered to in the motion. This is necessary to prevent the carefully drawn procedures in subsection (e) from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

The special procedures in subsection (e) cannot be invoked until they are triggered by a Government affidavit that disclosure or an adversary hearing would harm the national security of the United States. If no such assertion is made, the committee envisions that mandatory disclosure of the application and order, and discretionary disclosure of other surveillance materials, would be available to the defendant, as is required under title III. When the procedure is so triggered, however, the Government must make available to the court a copy of the court order and accompanying application upon which the surveillance was based.

The court must then conduct an ex parte, in camera inspection of these materials as well as any other documents relation to the surveillance which the Government may be ordered to provide, to determine whether the surveillance was authorized and conducted in a manner which did not violate any constitutional or statutory right of the person against whom the evidence is sought to be introduced. The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to make an accurate determination of the legality of the surveillance.

The question of how to determine the legality of an electronic surveillance conducted for foreign intelligence purposes has never been decided by the Supreme Court. As Justice Stewart noted in his concurring opinion in *Giordano* v. *United States:*

> Moreover, we did not in *Alderman*, *Butenko* or *Ivanov*, and we do not today, specify the procedure that the district courts are to follow in making this preliminary determination [of legally.]

394 U.S. 310, 314 (1968); see also, *Taglianetti* v. *United States*, 394 U.S. 316 (1968)[4]. The committee views the procedures set forth in this subsection as striking a reasonable balance between an entirely in camera proceeding which might adversely affect the defendant's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information.

The decision whether it is necessary to order disclosure to a person is for the Court to make after reviewing the underlying documentation and determining its volume, scope, and complexity. The committee has noted the reasoned discussion of these matters in the opinion of the Court in *United States* v. *Butenko, supra.* There, the Court, faced with the difficult problem of determining what standard to follow in balancing national security interests with the right to a fair trial, stated:

> The distinguished district court judge reviewed in camera the records of the wiretaps at issue here before holding the surveillance to be legal * * *. Since the question confronting the district court as to the second set of interceptions was the legality of the taps, not the existence of tainted evidence, it was within his discretion to grant or to deny Ivanov's request for disclosure and a hearing. The exercise of this discretion is to be guided by an evaluation of the complexity of the factors to be considered by the court and by the likelihood that adversary presentation would substantially promote a more accurate decision. (494 F. 2d at 607.)

Thus, in some cases, the Court will likely be able to determine the legality of the surveillance without any disclosure to the defendant. In other cases, however, the question may be more complex because of, for example, indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order. In such cases, the committee contemplates that the court will likely decide to order disclosure to the defendant, in whole or in part, since such disclosure "is necessary to make an accurate determination of the legality of the surveillance." [33]

4. 89 S.Ct. 1099, 22 L.Ed.2d 302.

[33] Cf. *Alderman* v. *United States*, 394 U.S. 165, 182 n. 14, 89 S.Ct. 961, 22 L.Ed.2d 176 (1968); *Taglianetti* v. *United States*, supra at 317.

Cases may arise, of course, where the Court believes that disclosure is necessary to make an accurate determination of legality, but the Government argues that to do so, even given the Court's broad discretionary power to exercise certain sensitive portions, would damage the national security. In such situations the Government must choose—either disclose the material or forgo the use of the surveillance-based evidence. Indeed, if the Government objects to the disclosure, thus preventing a proper adjudication of legality, the prosecution would probably have to be dismissed, and, where the Court determines that the surveillance was lawfully authorized or conducted, the court would, "in accordance with the requirements of law," suppress that evidence which was unlawfully obtained.

The committee has chosen the general phrase "in accordance with the requirements of law" to deal with the problem of what procedures are to be followed in those cases where the trial court determines that the surveillance was unlawfully authorized or conducted. The evidence obtained would not, of course, be admissible during the trial. But beyond this, in the case of an illegal surveillance, the Government is constitutionally mandated to surrender to the defendant all the records of the surveillance in its possession in order for the defendant to make an intelligent motion on the question of taint. The Supreme Court in *Alderman* v. *United States*, *supra*, held that, once a defendant claiming evidence against him was the fruit of unconstitutional electronic surveillance has established the illegality of such surveillance (and his "standing" to object), he must be given confidential materials in the Government's files to assist him in establishing the existence of "taint." The Court rejected the Government's contention that the trial court could be permitted to screen the files in camera and give the defendant only material which was "arguably relevant" to his claim, saying such screening would be sufficiently subject to error to interfere with the effectiveness of adversary litigation of the question of "taint." The Supreme Court has refused to reconsider the *Alderman* rule and, in fact reasserted its validity in its *Keith* decision. (*United States* v. *U.S. District Court*, *supra*, at 393.)

Where the court determines that the surveillance was lawfully authorized and conducted, it would, of course, deny any motion to suppress. In addition, once a judicial determination is made that the surveillance was lawful, a motion for discovery of evidence must be denied unless disclosure or discovery is required by due process.

Subsection (f) provides for notice to be served on U.S. citizens and permanent resident aliens who were targets of an emergency surveillance and, in the judge's discretion, on other citizens and resident aliens who are incidentally overheard, where a judge denies an application for an order approving an emergency electronic surveillance. Such notice shall be limited to the fact that an application was made, the period of the emergency surveillance, and the fact that during the period information was or was not obtained. This notice may be postponed for a period of up to 90 days upon a showing of good cause to the judge. Thereafter the judge may forgo the requirement of notice upon a second showing of good cause.

The fact which triggers the notice requirement—the failure to obtain approval of an emergency surveillance—need not be based on